

11-1200-434

State Auditor Number

DEPARTMENT OF EDUCATION  
STATE OF SOUTH DAKOTA  
CONSULTANT CONTRACT  
FOR CONSULTANT SERVICES BETWEEN

( LexisNexis Academic & Library Solutions )	( South Dakota State Library )
( Pricing & Sales Operations )	( 800 Governors Drive )
( Attn: Roger Garner, Manager )	( Pierre, SD 57501-2294 )
( 7500 Old Georgetown Road, Suite 1300 )	( )
( Bethesda, MD 20814 )	( )

AND

( Hereinafter referred to as Consultant )	( Hereinafter referred to as State )
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The State hereby enters into an Agreement for Consultant Services with the Consultant.

I. THE CONSULTANT:

- A. The Consultant services on this agreement commence September 1, 2010 and shall end August 31, 2013.
- B. The Consultant has affirmed that he/she is not a full-time state employee as per SDCL 3-12-47.
- C. The Consultant will not use state equipment, supplies, and facilities.
- D. The Consultant agrees to:
  1. Provide to the State and its Authorized Users a non-exclusive, nontransferable, limited license to access and use for research purposes the LexisNexis Academic and Library Solutions web-based subscription services. All research shall be directly connected to the educational activities of the State and its Authorized Users. Authorized Users are defined as:

**Higher Education Institutions:** Enrolled students, active instructors, active faculty, and administrative staff. Any person who does possess an authorized and valid college or university identification is not an Authorized User.

**Primary and Secondary Education Institutions:** Enrolled students and current teaching and administrative staff.

**Public Library Systems:** Staff of the library system, registered patrons of the library, and library patrons using the Services on-site at the library.

**State Libraries:** Staff of the library system, registered patrons of the library, and library patrons using the Services on-site at the library.

**Additional Authorized Users for all types of Subscribers:** Other researchers designated by the State and approved by the Consultant.

**Materials:** Materials are defined as all documents, bibliographic records, images, computer files and other materials accessed through the Services.

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AND

## 2. GRANT

Consultant hereby grants to State and its Authorized Users a non-exclusive, non-transferable, limited license to access and use for research purposes the Services licensed to State by means of a Purchase Order, either submitted by State or by another entity acting on its behalf. All research shall be directly connected to the educational activities of State. Any other use of the Services is STRICTLY PROHIBITED. The Services and any portion thereof shall remain the property of Consultant. Neither State nor its Authorized Users shall, or allow others to, create derivative products for resale. This license includes for each Authorized User:

- a) The right to electronically display Materials to no more than one person at a time (no dissemination or redistribution via electronic bulletin boards, e-mail distribution lists, intranets, the Internet or similar electronic medium). This does not limit the number of simultaneous users who may access the Services at the same time. However, Authorized Users may display a portion of the Materials at any one time (i.e., cannot display all Materials contained in a Service at one time) to multiple parties for purposes of training and classroom instruction only;
- b) The right to download an insubstantial number of documents retrieved from the Services and store them in machine-readable form, primarily for one person's exclusive use (the Authorized User who downloaded the Materials);
- c) The right to print documents retrieved from the Services; and
- d) Neither State nor its Authorized Users shall or permit others to access or use the Services in any manner whatsoever by any means other than the user interface provided by Consultant or Consultant's approved third-party supplier. Use of the Services is permitted only via manually conducted, discrete, individual search and retrieval activities. All access to and use of the Services via mechanical, programmatic, robotic, scripted or any other automated means is STRICTLY PROHIBITED.

To the extent permitted by applicable copyright law, Authorized Users, may make copies of Materials retrieved from the Services and distribute such copies. Except as specifically provided in the above license, Authorized Users are prohibited from downloading, storing, reproducing, transmitting, displaying, copying, distributing, or using Materials retrieved from the Services. Consultant is responsible for displaying all copyright notices to Authorized Users before printing or downloading of the Materials can occur.

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3. Provide online access to the subscription resource LexisNexis Statistical Insight Base Subscription, including the add-on portions of LexisNexis Statistical Insight – Tables Option, LexisNexis Statistical Insight – ASI, IIS, SRI Abstracts and Indexing. Access to the service will be unlimited, simultaneous, and institute-wide. Remote access will be permitted with secure patron authentication. Authentication will be coordinated with LexisNexis.
  4. Provide online access to the subscription resources LexisNexis State Capital. Access to the service will be unlimited, simultaneous, and institute-wide. Remote access will be permitted with secure patron authentication. Authentication will be coordinated with LexisNexis.
  5. Provide online access to the subscription resource LexisNexis Congressional and the LexisNexis Congressional Indexes. Access to the service will be unlimited, simultaneous, and institute-wide. Remote access will be permitted with secure patron authentication. Authentication will be coordinated with LexisNexis.
  6. The Consultant hereby grants the State permission to use Remote Patron Authentication proxy scripts ("RPA") provided by the Consultant to provide access to and use of the Services by its Authorized Users, as defined in this contract. This contract extends to the State Authorized Users who are not geographically located at the States Institution's site and not covered by the normal IP address authentication method used by the Consultant. Pursuant to this Addendum, Authorized Users may use a variety of Internet connection, including connections provided by commercial Internet Service Providers, academic institutions, and dial-up connections to the State's network.
  7. The parties agree that the State is a "State Library System" and that the only persons who are authorized to use the Services, as set forth in Article D, are as follows: "Staff of the library system, registered patrons of the library, and library patrons using the Services on-site at the library."
  8. The parties agree that registered patrons of the library may only access the Service remotely via the State Library's homepage which will require the registered library patron to use his or her state library card ID number and password to access the Service. The parties further agree that the State Library may use IP authentication for State Library site only.
- E. To the fullest extent permitted by law, Consultant at its option and expense, shall either defend or settle any action and hold State harmless against proceedings or damages of any kind, not excluding the State's right to participate, any proceeding based upon a third

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party's claim asserted against State of U.S. patent, trademark, servicemark, copyright or trade secret infringement related to use of data provided under this Agreement ("Online Services") provided: (i) all use of the Online Services and Materials was in accordance with the Subscription Agreement; (ii) the claim, cause of action or infringement was not caused by State modifying or combining the Online Services or Materials with or into other products or applications not approved by Consultant; (iii) State gives Consultant prompt notice of any such claim; and (iv) State gives Consultant the right to control and direct the investigation, defense and settlement of each such claim. State, at Consultant's expense, shall reasonably cooperate with Consultant in connection with the foregoing. In addition, if the Online Services or the operation thereof become, or in the opinion of Consultant are likely to become, the subject of a claim of infringement, Consultant will, at its option and expense either: (i) procure for State the right to continue using the Online Services, (ii) replace or modify the Online Services so that they become non-infringing; or (iii) terminate the Subscription Agreement on notice to State and grant State a pro-rata refund or credit (whichever is applicable) for any pre-paid fees or fixed charges.

F. The Consultant agrees to provide services in compliance with the Americans with Disabilities Act of 1990.

G. OWNERSHIP OF THE SERVICES

All right, title and interest (including all copyrights and other intellectual property rights) in the Services (in both print and machine-readable forms) belong to Consultant or its third party suppliers of Materials. State acquires no proprietary interest in the Services, Materials, or copies thereof.

Neither State nor its Authorized Users may use, or permit others to use, the Services or Materials in any fashion that infringes the copyrights or proprietary interests therein. Authorized Users may not remove or obscure the copyright notice or other notices contained in the Materials.

H. RESTRICTIONS

Authorized Users may not use the Materials to determine a consumer's eligibility for (a) credit or insurance for personal, family, or household purposes; (b) employment; or (c) a government license or benefit.

Use of the Services for commercial purposes is strictly prohibited. Access to the Services shall not be shared with unauthorized users under any circumstances whatsoever. Any unauthorized access permitted by State or its Authorized Users is prohibited. State will use reasonable efforts to prevent unauthorized users from accessing or using the Services.

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All access to and use of the Online Services via mechanical, programmatic, robotic, scripted or any other automated means is strictly prohibited. Use of the Services is permitted only via manually conducted, discrete, individual search and retrieval activities.

Subscribing Institutions that are Higher Education Institutions shall not encourage or promote the use of the Services by walk-in users, and shall cooperate with Consultant to identify and stop any use by walk-in users that is detrimental to the interests of Consultant or its content providers.

Other provisions that govern Authorized Users use of the Services are set forth in, online descriptions of files, online notices following file selection, and individual documents retrieved from the Services (collectively, the "Additional Terms"), all of which are incorporated by reference into this Agreement.

I. COPYRIGHT/TERMS AND CONDITIONS

State and its Authorized Users hereby acknowledge that all copyright and title to the Materials and organization are and remain the property of Consultant or its third party suppliers of Materials. Any exceptions are identified in this Agreement. State agrees to communicate the substance of the following statement (which may be changed in whole or in part by Consultant from time to time), to its users periodically:

"LexisNexis online services and the materials contained therein are under copyright by LexisNexis. All rights reserved. No part of these Services may be used except for research purposes, and the Services may not be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior written permission of the LexisNexis Academic Library Solutions. Materials retrieved from the Services may not be duplicated in hard copy or machine-readable form without the prior written authorization of LexisNexis Academic & Library Solutions, except that limited reproduction of output is permitted solely for individual use by the Authorized User or internal distribution within the Subscribing Institution in accordance with the terms of this Agreement unless further limited or prohibited by the Copyright Act of 1976. Under no circumstances may the Materials or any portion thereof be used to create derivative products or services."

J. WARRANTY

Consultant represents and warrants that it has the full right and authority to make the Services available to State and its Authorized Users pursuant to this Agreement.

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EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT THE SERVICES ARE PROVIDED ON AN "AS IS", "AS AVAILABLE" BASIS AND CONSULTANT AND EACH THIRD PARTY SUPPLIER OF MATERIALS EXPRESSLY DISCLAIM ALL WARRANTIES, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Consultant warrants that: (a) the Services are suitable for the ordinary purposes for which such services are used; and (b) the Services are designed in a commercially reasonable manner.

K. LIMITATION OF LIABILITY

Except as otherwise provided in this agreement, a Covered Party shall not be liable for any consequential or special damages or attorney's fees which arise under this agreement. Except as otherwise provided in this agreement, no Covered Party shall be liable for any costs, expenses, or damages arising under or related to this agreement that exceeds the amount of fees paid during the twelve (12) month period immediately preceding the date the claim arose. This limitation of liability and any other limitation or exclusion of damages in this agreement do not limit or exclude the Covered Parties' liability for intellectual property rights infringement or for injury or damage to property of the State arising from the acts, of the Covered Party for which the Covered Party may be liable, or for attorney's fees and related costs that the State is entitled to recover as the prevailing party under this sentence.

"Covered Party" means (a) Consultant, its affiliates, and any officer, director, employee, subcontractor, agent, successor, or assign Consultant or its affiliates; and (b) each third party supplier of Materials, their affiliates, and any officer, director, employee, subcontractor, agent, successor, or assign of any third party supplier of Materials or any of their affiliates.

L. The LexisNexis General Terms and Conditions for Use of the Online Services

<https://www.lexisnexis.com/terms/general>, subject to Section 5.1 therein, may be immediately changed by Consultant by providing State with written notice or, from time to time, by written agreement between the parties. State's license for access to the Services may be terminated immediately upon written notice to Consultant if any change is unacceptable. In the event of a material breach that remains uncured, Consultant or State may terminate the subscription for access to the Services. The effective date of termination will be 30 days from the date notice of the specific breach is provided in the event of a material breach pursuant to Sections I.D.2 or I.H. by State or an Authorized User, Consultant reserves the right to immediately suspend State's access to and use of the Services without prior notice and to pursue any legal remedies available to Consultant.

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## II. THE STATE:

- A. The State will make a total payment upon satisfactory completion of the services on the contract not to exceed \$39,459.00. Payment will be made in annual installments as follows:

The first installment, in the amount of \$13,153.00, will be made for services occurring September 1, 2010 through August 31, 2011, upon receipt of an invoice submitted by the Consultant and approved by the State.

The second installment, not to exceed \$13,153.00, will be made subsequent to September 1, 2011, for services occurring September 1, 2011 through August 31, 2012, upon receipt of an invoice submitted by the Consultant and approved by the State.

The third and final installment, not to exceed \$13,153.00, will be made subsequent to September 1, 2012, for services occurring September 1, 2012 through August 31, 2013, upon receipt of an invoice submitted by the Consultant and approved by the State.

- B. The State will not pay Consultant expenses as a separate item.
- C. The State shall use reasonable efforts to limit use of the Products to Authorized Users only and to protect the security of the Products while administering RPA, including but not limited to the following:
- 1) The State shall employ a secure and dependable patron authentication system that can accurately identify Authorized Users and control access to the RPA proxy script for Authorized Users only. At a minimum, the State will employ a system that assigns unique authentication credentials to Authorized Users and encrypts this information over public access networks such as the Internet.
  - 2) The State shall provide details about its patron authentication system to the Consultant upon request.
  - 3) The State shall use reasonable efforts to protect the RPA proxy script and RPA identification numbers ("Id") and passwords so they cannot be viewed, downloaded, or copied by unauthorized individuals. At a minimum, the State must protect the RPA proxy script Id's and passwords with host security access controls, restricting access to personnel responsible for maintaining the RPA proxy at the State's location.
  - 4) The State shall not make changes to the RPA script without the written consent of the Consultant and shall not attempt to use any other script or computer program to provide remote access to the Products.

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- 5) The State shall notify the Consultant of any changes to its patron authentication system that may affect the security of the Products.
- 6) The State shall immediately notify the Consultant if it detects any attempt to gain unauthorized access to the Products through the RPA proxy script or of unauthorized use or modification of the RPA proxy script.
- III. SUPERCESSION PROVISION: All other prior discussions, communications and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.
- IV. AMENDMENT PROVISION: This contract contains the entire agreement between the parties, and is subject to and will be construed under the laws of the State of South Dakota, and may be amended only in writing signed by both parties.
- V. TERMINATION PROVISION: This agreement can be terminated upon thirty (30) days written notice by either party and may be terminated for cause by the State at any time with or without notice.
- VI. INSURANCE PROVISION: The Consultant agrees, at its sole cost and expense, to maintain the appropriate insurance required by the State during the period of this agreement.
- VII. CONTROLLING LAW PROVISION: This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.
- VIII. COMPLIANCE PROVISION: Consultant will comply with all federal, state and local laws, regulations, ordinances, guidelines, permits and requirements applicable to providing services pursuant to this Agreement, and will be solely responsible for obtaining current information on such requirements.
- IX. DEFAULT PROVISION: This agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. This agreement will be terminated by the State if the Legislature fails to appropriate funds or grant expenditure authority. Termination for this reason is not a default by the State nor does it give rise to a claim against the State.



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- X. **EQUAL EMPLOYMENT OPPORTUNITY CLAUSE:** Consultant is required to comply with E.O. 11246, "Equal Employment Opportunity", as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR Part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."
- XI. **NONDISCRIMINATION CLAUSE:** Consultant agrees to comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681-1683 and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) Sections 523 and 527 of the Public Health Services Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply.
- XII. **DEBARMENT, SUSPENSION INELIGIBILITY, AND VOLUNTARY EXCLUSION PROVISION:** Consultant certifies, by signing this agreement, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by a Federal department or agency; have not, within a three (3) year period preceding the awarding of this grant, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsifications, or destruction of records, making false statements, or receiving stolen property, or have not within a three (3) year period preceding this contract had one or more public transactions (federal, state, or local) terminated for cause or default.

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AND

In witness hereto the parties signify their agreement by signature affixed below:

Nelson Boyd 12/29/10  
Consultant Signature (Date)

[Signature] 1/5/11  
Authorized State Representative (Date)  
Department of Education

[Signature] 1-13-11  
Commissioner (Date)  
Bureau of Information & Telecommunications

[Signature] 1-12-11  
Commissioner (Date)  
Bureau of Administration

State Agency Coding: (Center/Company/Account)  
State Agency contact who can provide additional  
information regarding this contract:

124353023320/2024/520401009

Julie Erickson (605) 295-1994